STATE OF MICHIGAN

COURT OF APPEALS

JAMES GRAY and EVA GRAY, Plaintiffs-Appellees, v CITIMORTGAGE, INC., Defendant-Appellant.	UNPUBLISHED June 11, 2013 No. 312971 Macomb Circuit Court LC No. 2012-001696-CZ

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] an order denying its motion for summary disposition in this case involving a foreclosure by advertisement of plaintiffs' home (the property). We reverse and remand for entry of an order granting defendant's motion for summary disposition. We also remand for further proceedings on defendant's motion for sanctions.

Plaintiffs do not dispute that they failed to pay their mortgage, that the redemption period expired, and that they did not redeem the property. Although plaintiffs no longer have any right to or interest in the property, we will assume that the trial court was correct in holding that they adequately pled a basis for standing to pursue their quiet title action. Having made that assumption, however, we hold that defendant was entitled to summary disposition because it met all of the requirements under MCL 600.3204(1) to foreclose by advertisement.

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). Because the trial court considered evidence outside the pleadings in deciding defendant's motion, it decided the motion pursuant to MCR 2.116(C)(10). Summary disposition is proper under MCR 2.116(C)(10) when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486, 497-498; 815 NW2d 132 (2012). When considering a motion brought under

[1] See *Gray v CitiMortgage, Inc*, unpublished order of the Court of Appeals, entered November 26, 2012 (Docket No. 312971).

MCR 2.116(C)(10), the trial court considers "the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id*. at 497.

The Legislature enacted a comprehensive statutory scheme governing whether a party can foreclose by advertisement and if so, the requirements that must be fulfilled. See MCL 600.3201 *et seq*. An eligible party can foreclose by advertisement when all of these conditions are met: (1) the mortgagee has defaulted on a condition of the mortgage, triggering the power to sell; (2) no action has been instituted at law to recover the debt that the mortgage secures; (3) the mortgage with the power of sale has been recorded properly; and (4) the foreclosing party is "either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage." MCL 600.3204(1).[2] In addition, "[i]f the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of [the foreclosure] sale . . . evidencing the assignment of the mortgage to the party foreclosing the mortgage." MCL 600.3204(3). Before beginning foreclosure proceedings, the foreclosing party must send the mortgagee a notice that includes information about the amount due on the mortgage loan, the contact information for the mortgage holder and servicer, and the designated person to contact to pursue modification of the mortgage loan. MCL 600.3205a.[3]

In denying defendant's motion for summary disposition, the trial court concluded that defendant did not comply with the statutory notice requirement for foreclosure by advertisement because Orlans Associates P.C., which defendant retained to administer its foreclosures, sent plaintiffs the notice instead of defendant directly. For at least two reasons we conclude otherwise. First, it is axiomatic that an attorney can act on behalf of his client, see *Uniprop, Inc v Morganroth*, 260 Mich App 442, 447; 678 NW2d 638 (2004), and Orlans clearly stated in the first sentence of the notice to plaintiffs that it represented defendant.

Second, even if there was a problem with the notice, such a defect does not render the foreclosure sale *void*, it makes it merely *voidable*. See *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 502; 739 NW2d 656 (2007). Plaintiffs admitted that they received the notice, and they have not presented any evidence or made any allegations that they were prejudiced because the notice was sent by Orlans instead of defendant. In fact, plaintiffs did not raise this issue in their complaint or response to defendant's motion for summary disposition. The trial court, acting sua sponte, incorrectly relied on this purported defect in concluding that defendant was not entitled to summary disposition.

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[2] Because defendant began foreclosure proceedings in August of 2011, a prior version of MCL 600.3204, 2011 PA 72, applies. The relevant language is the same in both the applicable and current versions of MCL 600.3204.

[3] A prior version of MCL 600.3205a, 2009 PA 30, applies. The pertinent language is the same in both the applicable and current versions of MCL 600.3205a.

Although not addressed by the trial court, plaintiffs asserted in their complaint that the foreclosure on the property was invalid because defendant did not have a record chain of title to the mortgage. As previously noted, MCL 600.3204(3) states, "[i]f the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of [the foreclosure] sale . . . evidencing the assignment of the mortgage to the party foreclosing the mortgage."

In this case, the foreclosing party was not the original mortgagee; the original mortgagee was Lender LTD, d/b/a Creative Mortgage Funding, Inc. Thus, defendant needed a record chain of title demonstrating that it was assigned the mortgage and could foreclose on the property. Defendant has provided evidence that (1) Lender LTD assigned the mortgage to ABN AMRO Mortgage Group, Inc., and that assignment was recorded, and (2) that it acquired the mortgage from ABN AMRO when ABN AMRO merged into defendant.

In *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98, 108-116; 825 NW2d 329 (2012), our Supreme Court reaffirmed the long-standing law that title to the mortgage does not need to be recorded for purposes of the foreclosure by advertisement statute if it occurs by operation of law. In that case, the Federal Deposit Insurance Corporation (FDIC) was appointed receiver for Washington Mutual's holdings, including the mortgage at issue in that case. *Id*. at 103. The FDIC transferred the mortgage, and most of Washington Mutual's assets, to Chase, using a purchase and assumption agreement. *Id*. Although the FDIC had the statutory authority under 12 USC 1821 to transfer Washington Mutual's assets "without any approval, assignment, or consent[,]" the FDIC did not use that authority. *Id*. Chase then foreclosed on the mortgage by advertisement. *Id*. at 104. The trial court concluded that Chase did not violate MCL 600.3204(3), even though the assignment of the mortgage from the FDIC was not recorded, because it acquired the mortgage "by operation of law." *Id*. This Court disagreed, concluding that Chase did not acquire the mortgage by operation of law, so Chase needed to record the assignment before it could foreclose by advertisement. See *id*. at 105.

The Supreme Court agreed that Chase failed to comply with MCL 600.3204(3) because it did not record the assignment and did not acquire the mortgage by operation of law. *Kim*, 493 Mich at 108-116. The Court concluded that "a transfer that takes place by operation of law occurs unintentionally, involuntarily, or through no affirmative act of the transferee," *id*. at 110, and so because Chase acquired the mortgage in a voluntary transaction, i.e., it was not forced to purchase Washington Mutual's assets from the FDIC, the transfer was not by operation of law, *id*. However, relevant to the present case, the Court noted that had the defunct bank merged with Chase, then "defendant would have a strong argument that it had merely stepped into the shoes of WaMu [the defunct bank]. It would have had no need to engage in a transfer of any of WaMu's assets." *Id*. at 111.

Here, the evidence shows that ABN AMRO merged into defendant. As the *Kim* Court recognized, such a corporate merger is a transaction "by operation of law under traditional banking and corporate law[,]" because such a transaction "occurred without any voluntary or affirmative action by defendant[.]" *Kim*, 493 Mich at 111, citing MCL 450.1724(1)(b). As a result, defendant was not required to record the mortgage once the merger occurred, and plaintiffs' argument to the contrary is without merit.

And, even if defendant was required to record the mortgage, its failure to do so did not prejudice plaintiffs. *Kim*, 493 Mich at 115. "To demonstrate such prejudice, they must show that they would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute." *Id.* at 115-116. As we previously recognized, nothing in the complaint or evidence shows any prejudice to plaintiffs by the failure of defendant to record the mortgage. It is undisputed that plaintiffs were given proper notice of their default, of the foreclosure proceedings, and the right to redeem. They were also given notice of their opportunity to seek a loan modification and temporary stay of the commencement of the foreclosure proceedings. In light of these undisputed facts, plaintiffs could not establish prejudice even if defendant violated the foreclosure by advertisement statute.

We also reject as patently without merit plaintiffs' argument that defendant's mortgage interest was invalid because the mortgage was severed from the note during the securitization process. The Michigan Supreme Court rejected this argument in *Residential Funding Co, LLC v Saurman*, 490 Mich 909, 910; 805 NW2d 183 (2011):

> "It has never been necessary that the mortgage should be given directly to the beneficiaries. The security is always made in trust to secure obligations, and the trust and the beneficial interest need not be in the same hands. . . . The choice of a mortgagee is a matter of convenience." *Adams v Niemann*, 46 Mich 135, 137[; 8 NW 719] (1881). See also, *Canvasser v Bankers Trust Co*, 284 Mich 634, 639[; 280 NW 71] (1938). Indeed, in interpreting predecessor foreclosure-by-advertisement statutes, in cases in which the mortgagee had transferred a beneficial interest, but retained record title, this Court has unanimously held that "[o]nly the record holder of the mortgage has the power to foreclose; the validity of the foreclosure is not affected by any unrecorded assignment of interest held for security." *Arnold v DMR Fin Servs, Inc (*AFTER REMAND*)*, 448 Mich 671, 678[; 532 NW2d 852] (1995); see also, *Feldman v Equitable Trust Co*, 278 Mich 619, 624-625[; 270 NW 809] (1937).

Thus, severing a mortgage and promissory note do not render a mortgage interest invalid or preclude the mortgagee from foreclosing. See *Residential Funding Co*, 490 Mich at 910.

Finally, defendant argues that plaintiffs' claim was frivolous and it is entitled to sanctions. In light of our conclusions in this opinion, we remand that issue back to the trial court for further proceedings, as that court is in the best position to decide this issue.

Reversed and remanded for entry of an order granting defendant's motion for summary disposition. We also remand for further proceedings on defendant's motion for sanctions. We do not retain jurisdiction.

Defendant may tax costs as the prevailing party. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Mark T. Boonstra